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route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section; and

(2) That either:

(i) The complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.

(b) Other considerations. (1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) When prescription of a through route, a through rate, or reciprocal switching is necessary to remedy or prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

(4) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

§ 1144.3 General.

(a) These rules will govern the Board's adjudication of individual cases pending on or after the effective date of these rules (October 31, 1985).

(b) Discovery under these rules is governed by the Board's general rules of discovery at 49 CFR part 1114.

(c) Any Board determinations or findings under this part with respect to compliance or non-compliance with the standards of § 1144.2 shall not be given any res judicata or collateral estoppel effect in any litigation involving the

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same facts or controversy arising under the antitrust laws of the United States.

PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES

AUTHORITY: 49 U.S.C. 721, 11101, and 11123.

§ 1146.1 Prescription of alternative rail service.

(a) *General.* Alternative rail service will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

(b)(1) *Petition for Relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply.* The incumbent carrier must file a reply to a petition under

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this paragraph within five (5) business days.

(3) *Rebuttal*. The party requesting relief may file rebuttal no more than three (3) business days later.

(c) *Presumption of continuing need*. Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation emergency will continue for more than 30 days from the date of that order.

(d)(1) *Petition to terminate relief*. Should the Board prescribe alternative rail service under paragraph (a), of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carrier are admonished not to file such a petition prematurely.

(2) *Reply*. Parties must file replies to petitions to terminate filed under this subsection within five (5) business days.

(3) *Rebuttal*. The incumbent carrier may file any rebuttal no more than three (3) business days later.

(e) *Service*. All pleadings under this part shall be served by hand or overnight delivery on the Board, the other parties, and the Federal Railroad Administration.

[63 FR 71401, Dec. 28, 1998]

PART 1147—TEMPORARY RELIEF UNDER 49 U.S.C. 10705 AND 11102 FOR SERVICE INADEQUACIES

AUTHORITY: 49 U.S.C. 721, 10705, 11101, and 11102.

§ 1147.1 Prescription of alternative rail service.

(a) *General*. Alternative rail service will be prescribed under 49 U.S.C. 11102(a), 11102(c) or 10705(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

(b)(1) *Petition for Relief*. Affected shippers or railroads may seek relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply*. The incumbent carrier must file a reply to a petition under this paragraph within thirty (30) days.

(3) *Rebuttal*. The party requesting relief may file rebuttal no more than fifteen (15) days later.

(c)(1) *Petition to terminate relief*. Should the Board prescribe alternative rail service under paragraph (a) of this section, the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service to affected shippers. Carriers are admonished not to file such a petition prematurely.

(2) *Reply*. Parties must file replies to petitions to terminate filed under this